

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/517,093

Applicant(s)

SEIBERTZ ET AL.

Examiner

LEZAH W. ROBERTS

Art Unit

1612

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 14 September 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-6, 11-23, 42-46 and 83-90.
Claim(s) withdrawn from consideration: 7-10, 24-41 and 47-82.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Frederick Krass/
Supervisory Patent Examiner, Art Unit 1612

/Lezah W Roberts/
Examiner, Art Unit 1612

Continuation of 11, does NOT place the application in condition for allowance because:

In regard to the substances mentioned in paragraph 0082 never being regarded as "non-aqueous solvents", the binders listed are dissolved in non-aqueous solvents, thus encompassing suspending the components in a solvent or suspending agent that is substantially free from water. The reference states: "Examples of hot-melt extrudable effervescent granule binders include acacia, tragacanth, gelatin, starch, cellulose materials such as methyl cellulose and sodium carboxymethyl cellulose, alginic acids and salts thereof, polyethylene glycol, guar gum, polysaccharide, sugars, invert sugars, poloxomers (PLURONIC F68, PLURONIC F127), collagen, albumin, gelatin, celluloses in 'nonaqueous solvents', and combinations of the above and the like" (see paragraph 0082). Although the components disclosed in paragraph 0082 cannot be removed by drying, the solvent they are in can be removed. Further, although a mixture is not always a solution or suspension, a solution and a suspension are encompassed by the term mixture because they may comprise two components that do not chemically react, especially in the case of a suspension. The components of McGinity et al. are blended together and include plasticizers, then are melted, which read on a fluid and thus when the components are mixed they would encompass a solution or suspension because the binder has been liquefied by melting and the actives are suspended or dissolved in the liquefied binder. The plasticizers include glycerin and propylene glycol, which are liquids and thus it is reasonable to conclude that they would contribute to the formation of the compositions to liquids when melted. The binders may also be considered suspending agents because they are the carriers of the active agents and they create the film (see Examples). The prior art also discloses the binders listed in McGinity et al. are also classified as "suspending agents" (see USP 6,488,963 to McGinity et al., col. 10, lines 1-6). In regards to the references not disclosing that the effervescent components are susceptible to degradation by heat, paragraph 0015 discloses extremely elevated temperatures could degrade extruded materials that combine to form an effervescent composition.

In order to clarify the record, the rejection statement "Claims 1-6, 11-23 and 42-46 are rejected under 35 USC 102(b) as being anticipated by McGinity et al. (2001/0006677)" was mistakenly restated in the previous Office Action mailed May 11, 2009 and has been withdrawn in the Office action mailed May 11, 2009.